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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

**No. 73-204**

JUDICIAL COUNCIL OF THE THIRD CIRCUIT,
*Petitioner,*

*v.*

JOSEPH M. NOLAN,
*Respondent.*

## BRIEF FOR RESPONDENT JOSEPH M. NOLAN IN OPPOSITION TO PETITION FOR CERTIORARI

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## ARGUMENT

(1) There are significant unresolved issues concerning the authority and procedures of judicial councils. Those issues were rendered irrelevant by the opinion on appeal in this cause. Contrary to the underlying assertions in the Petition filed by the Judicial Council of the Third Circuit (Council), the Special Panel of the Court of Ap-

peals did not set aside or otherwise disturb the rule adopted by the Council. There was criticism of Council action in the opinion below, but not as to the content of the rule, or the authority of the Council. The criticism was directed to the procedures or absence of them used by the Council in adopting and enforcing its rule. Two judges who voted for the resolution had expressed opinions on the subject before the rule was considered; the resolution was passed without benefit of any hearing, record or objective fact finding; and the resolution was based upon erroneous, disputed and inflammatory information. No notice of its adoption was given to Nolan although he was the target of the Council's action, and its enforcement was insisted upon by dunning private correspondence directed to the Judge of the District Court. The District Court Judge who had handled the Chapter X reorganization proceedings since their inception was compelled to dismiss Nolan as attorney for the trustee without notice or hearing. The reorganization Judge expressed his concern as to the absence of due process afforded Respondent by these procedures:

> "Unfortunatley, I say with a degree of sadness, the District Court was by-passed.
>
> "It is, in my opinion, a terrible thing when the reputation of a reputable lawyer is damaged by accusation unsupported by fact, and it is a terrible thing in any Court if an unsupported accusation is given credence. It is not my concept of justice." [Record 35].

The special panel's criticism of the Council's procedures was justified. However, the resolution was otherwise left intact by the Court's opinion. The Special Panel merely ordered that respondent be afforded elemental

due process, namely notice and a hearing in the District Court. [A. 17] Judge Aldrich emphasized the limited aspect of the Court's decision:

> "The petition for rehearing filed on behalf of the Circuit Council appears to misunderstand fundamentally the narrow scope of our decision. In the first place, it neglects that, as we pointed out, and as Judge Lumbard in his dissent recognized, the Council's rule, regardless of its form, was designed for Nolan. Nor did we say that we wished to substitute our view of the proper decision for that of the Council. Quite the contrary, our disagreement was basically with procedure; adding, to show that the issue was not moot, that there was another legally possible solution." [A. 34]

In reaching its conclusion, the Court of Appeals necessarily decided that it had jurisdiction to review the order of the District Court terminating Respondent. Very few orders of that Court are not subject to its review. The fact that the order in this case was based upon a directive of a judicial council provides no special distinction exempting it from the customary reviewing process. Suggestions that there should have been a petition by Nolan for a rehearing (an interesting word in this context, since Nolan had *no* hearing) confirms the conclusion of the Court of Appeals that the rule was designed for him alone. Further, it ignores the obvious futility of such an application. The proposed alternative that review be limited to the United States Supreme Court would deny reasonable relief to most litigants preclude any reasonable check on Council power, and impose unnecessary burdens upon this Court.

In the final analysis, the opinion below merely decided that a private litigant has been denied and is entitled to due process of law. Petitioner would improperly remedy the absence of a hearing or record by describing on review its behind the scenes activities. See *Zuber* v. *Allen*, 396 U.S. 168, 196 (1969).

(2) The petition is premature. The directive of the Court of Appeals was that a hearing should be afforded Respondent as to re-instatement in the District Court, the court au courant" the reorganization proceedings (A. 35). That hearing has yet to be held. Any determination of the District Court will be subject to appeal. The District Court might determine Respondent should not be reinstated. At that time however, a clear formal record will be available for a reviewing court's action, with the additional view of a new judge. This procedure is consistent with the position previously taken by the Judicial Council that the Court of Appeals would have jurisdiction to review the proceedings in the District Court. (A. 2).

(3) The Judicial Council is not before this Court, its petition having been filed by unauthorized representatives.

28 U.S.C.A. §516 provides:

> "Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency or officer thereof is a party, or is interested, and securing evidence therefore, is reserved to officers of the Department of Justice, under the direction of the Attorney General."

28 U.S.C.A. §515 provides:

> "(a) The Attorney General or any other officer of the Department of Justice, or any attorney spe-

cially appointed by the Attorney General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States attorneys are authorized by law to conduct, whether or not he is a resident of the district in which the proceeding is brought.

"(b) Each attorney specially retained under authority of the Department of Justice shall be commissioned as special assistant to the Attorney General or special attorney, and shall take the oath required by law. Foreign counsel employed in special cases are not required to take the oath. The Attorney General shall fix the annual salary of a special assistant or special attorney at not more than $12,000."

28 U.S.C.A. §518 provides:

"(a) Except when the Attorney General in a particular case directs otherwise, the Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court and suits in the Court of Claims in which the United States is interested.

"(b) When the Attorney General considers it in the interests of the United States, he may personally conduct and argue any case in a court of the United States in which the United States is interested, or he may direct the Solicitor General or any officer of the Department of Justice to do so."

28 U.S.C.A. §519 provides:

> "Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States attorneys, assistant United States attorneys, and special attorneys appointed under section 543 of this title in the discharge of their respective duties."

28 U.S.C.A. §543 provides:

> "(a) The Attorney General may appoint attorneys to assist United States attorneys when the public interest so requires.
>
> "(b) Each attorney appointed under this section is subject to removal by the Attorney General."

Under these statutes, the Judicial Council may only be represented in these proceedings by the Office of the Attorney General or his designate. This has been recognized as to past proceedings in this matter as of July 18, 1973 since attorneys of the Department of Justice had appeared for the Council until that date.

Some agencies of the United States have been given specific statutory authority to proceed without the participation of the Attorney General, by falling within the words in 28 U.S.C.A. §519, "Except as otherwise authorized by law." Such is the case with the Administrator under the Emergency Price Control Act, the Interstate Commerce Commission, and the National Labor Relations Board, as has been noted in *F.T.C.* v. *Guignon*, 390 F. 2d 323 (8th. Cir.). The opinion in that case emphasizes the necessity for the Attorney General's representation

of any agency of the United States which is a party to the litigation and discusses the quoted words. There is no statutory exception available to the Judicial Council permitting it to proceed through private counsel. In *U. S. v. 1960 Acres of Land, etc.*, 54 F. Supp. 867 (S.D. Cal. C.D. 1944) it was held that the court had no jurisdiction over litigation involving an agency of the United States unless the Attorney General appeared. See also *United States* v. *Winston*, 170 U.S. 522 (1897); *Walling* v. *Crane*, 64 F. Supp. 88, 90 (N.D. Ga. 1945); *Booth* v. *Fletcher*, 101 F. 2d 676 (Dist. Col. 1939); *Richter* v. *U. S.*, 190 F. Supp. 159, 163-64 (E. D. Pa. 1960), affd. 296 F. 2d 509 (3 Cir. 1961), cert. den. 369 U.S. 828 (1962); *Smith* v. *United States*, 375 F. 2d 243 (5 Cir. 1967).

Rule 33 of this Court follows the statutory mandate. It provides:

> "(a) If the United States or an officer or agency thereof is a party, service of all brief, pleadings, notices and paper shall, notwithstanding the foregoing paragraph, be made upon the Solicitor General, Department of Justice, Washington, D.C. 20530. Where an agency of the United States authorized by law to appear in its own behalf is a party in addition to the United States, such agency shall also be served, in addition to the Solicitor General, in every case."

Here, the Solicitor General withdrew from the case on July 18, 1973. So far as any record shows, counsel on the Petition for a writ of certiorari are not in the office of the Attorney General and have no special or statutory designation reposing authority in them. Under the statutes and the cases, Council may not appear through them, and the court in which unauthorized appearances are made has no jurisdiction to proceed.

## CONCLUSION

**For the reasons stated, Respondent says that the Petition for a Writ of Certiorari should be denied.**

Respectfully submitted,

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